(15,408.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 277.

WILLIAM BURFENNING, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 13, 1895.

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1 STATE OF MINNESOTA, } ss:
County of Hennepin, }

I hereby certify and return that, at the city of Minneapolis, county and State aforesaid, on the 22nd day of August, A. D. 1888, I served the summons hereto attached upon the within-named Hall and Ducey Lumber Company personally by handing to and leaving with T. H. Shevelin, treasurer of said lumber company, a true and correct copy thereof.

Dated this 22nd day of August, 1888.

PETER P. SWENSEN,
Sheriff Hennepin County, Minn.,
By ROBERT E. BADER,
Deputy Sheriff.

Sheriff's Fees.

Service	$ 50
Travel	20
Total	$ 70

2 STATE OF MINNESOTA, } ss:
County of Hennepin, }

I hereby certify and return that, at the city of Minneapolis, county and State aforesaid, on the 22nd day of August, A. D. 1888, I served the summons hereto attached upon the within-named The Chicago, St. Paul, Minneapolis and Omaha Railroad Company personally by handing to and leaving with H. M. Pearce, assistant general freight agent at Minneapolis, a true and correct copy thereof.

Dated this 22nd day of August, 1888.

PETER P. SWENSEN,
Sheriff Hennepin County, Minn.,
By ROBERT E. BADER,
Deputy Sheriff.

Sheriff's Fees.

Service	$1 00
Travel	20
Total	$1 20

No.

5 STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

WILLIAM BURFENNING, Plaintiff,
against
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y Co. and The Hall & Ducey Lumber Company, Defendants. } Summons.

The State of Minnesota to the above-named defendant-:

You and each of you are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which said complaint has been filed with the clerk of this court, and to serve a copy of your answer to the said complaint on the subscriber-, at their office, in the city of Minneapolis, in the county of Hennepin and State of Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in said complaint, together with the costs and disbursements of this action.

Dated August 20th, 1888.

WILSON & LAWRENCE,
Plaintiff's Attorney-, Minneapolis, Minn.

Endorsed: 35133. State of Minnesota, district court, fourth judicial district, county of Hennepin. Wm. Burfenning, pl'ff, *vs.* C., —, M. & O. R'y Co. *et al.* Summons. Filed March 20th, 1890. C. B. Tirrell, clerk. Wilson & Lawrence, plaintiff's attorney-, 238–242 Boston block, Minneapolis, Minn.

4 WILLIAM BURFENNING, Appellant,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY Company and The Hall and Ducey Lumber Company, Respondents.

From Hennepin county district court.

Complaint.

Above-named plaintiff complains against defendants in the above-entitled action and avers:

That the defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, is a corporation duly organized, existing and doing business under the general laws of the State of Wisconsin.

That the defendant, The Hall & Ducey Lumber Company, is a corporation duly organized, existing and doing business under and pursuant to the general laws of the State of Minnesota.

That plaintiff is the owner in fee-simple and entitled to the immediate possession of the following-described premises, situate in the county of Hennepin and State of Minnesota, to wit, lot nine (9) in section fifteen (15), and lots eight (8), nine (9) and ten (10) in section twenty-two (22), township twenty-nine (29), and range
5 twenty-four (24), according to the Government survey thereof, said lot nine (9) in section fifteen (15) and lot eight (8) in section twenty-two (22) constituting and being an island in the Mississippi river, extending from a point opposite the mouth of Bassett's creek northwardly nearly to the Plymouth Avenue bridge, all in the city of Minneapolis, containing one and $\frac{95}{100}$ acres, more or less; and said lots nine (9) and ten (10) in said section twenty-two (22) being islands in said Mississippi river lying southeastwardly and near said first-described island.

That said defendants wrongfully and unlawfully and without any authority whatever have entered into possession of said land and are now in possession thereof, and unlawfully and unjustly withhold possession of the same from said plaintiff.

That said land is worth and of the value of twenty thousand dollars ($20,000), and the value of the use thereof is one hundred dollars ($100) per month.

That said plaintiff has demanded possession of said land from said defendants prior to the commencement of this action.

Wherefore plaintiff asks judgment that said defendants may be adjudged to surrender and deliver up possession of said land to said plaintiff, and for judgment against said defendants for $100 per month for the detention of said land, and for the costs and disbursements of this action.

WILSON & LAWRENCE,
Plaintiff's Attorneys,
238 *to* 242 *Boston Block, Minneapolis, Minn.*

(Filed August 22, 1888. E. J. Davenport, clerk, by L. G. Wheeler, deputy.)

(Said complaint is duly verified by the plaintiff.)

Dated August 21st, A. D. 1888.

6 *Answer of Defendant Hall & Ducey Lumber Co.*

Now comes the above-named defendant, The Hall & Ducey Lumber Company, and for its separate answer to the complaint of the plaintiff herein, first, admits—

That it is a corporation organized and doing business as in said complaint alleged,

And that the defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, is a corporation organized and doing business as in said complaint alleged.

Second. Denies each and every other allegation in said complaint contained.

Wherefore defendant asks that plaintiff take nothing by his action herein against it, and for its costs and disbursements herein laid out and expended.

ROB'T G. EVANS AND
J. H. HOWE,
Attorneys for Defendant.

Due service of the within answer admitted this 21st day of November, 1888.

WILSON & LAWRENCE.

Duly verified by Thomas H. Shevlin, its treasurer.

(Filed April 3d, 1889. C. B. Tirrell, clerk, by L. G. Wheeler, deputy.)

Answer of Defendant Railway Company.

Now comes the above-named defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, and for its separate answer to the complaint of plaintiff herein, first—

Admits that it is a corporation organized and doing business as in said complaint alleged,

And that the said defendant, The Hall & Ducey Lumber Company, is a corporation organized and doing business as in said complaint alleged.

7 Admits that defendant is in possession of said real estate, but denies that it wrongfully and without authority entered into possession thereof, and that it unlawfully and unjustly withholds possession of the same from plaintiff.

Second. Denies each and every other allegation in said complaint contained.

Third. Alleges that it is the owner in fee-simple of the real estate in said complaint described.

Wherefore defendant asks that plaintiff take nothing by his action herein against it, and for its costs and disbursements herein laid out and expended.

ROB'T G. EVANS AND
J. H. HOWE,
Attorneys for Defendant.

Due service of the within answer admitted this 21st day of November, 1888.

WILSON & LAWRENCE.

Duly verified by Robert G. Evans, its attorney.

(Filed April 3, 1889. C. B. Tirrell, clerk, by L. G. Wheeler, deputy.)

STATE OF MINNESOTA,
County of Hennepin.

District Court, Fourth Judicial Dist.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY and HALL & DUCEY LUMBER CO., Defendants.

The above-entitled action came on for trial before the undersigned judge of said court on the 27th day of June, 1889, a jury therein having been waived; Messrs. Wilson & Lawrence appearing for plaintiff, and J. H. Howe, Esq., and R. G. Evans appearing for defendants. And plaintiff in open court dismissed said action
8 as against the defendant, The Hall & Ducey Lumber Company, and the case proceeding to trial the court, having heard the arguments of counsel and having duly considered the evidence introduced, makes the following findings of fact, to wit:

That none of the allegations of plaintiff's complaint are sustained by the evidence, and that each and all of said allegations are untrue; and as a conclusion of law thereon finds—

That the plaintiff is not the owner nor entitled to the possession of the real estate in said complaint described, or any part thereof.

It is therefore ordered that the plaintiff take nothing by his action against said defendant, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, and that said defendant recover of plaintiff its costs herein laid out and expended, to be hereafter taxed; and as to defendant The Hall & Ducey Lumber Company that said action be, and hereby is, dismissed.

Let judgment be entered accordingly.

By the court:

FREDERICK HOOKER, *Judge.*

(Filed June 27, 1889. C. B. Tirrell, clerk.)

STATE OF MINNESOTA,
County of Hennepin.

District Court, Fourth Judicial Dist.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and THE HALL & DUCEY LUMBER CO., Defendants.

9 The above-entitled action came on for trial at the regular April, 1889, general term of the above-named court, on the 27th day of June, 1889, before Hon. Frederick Hooker, judge of said court, without a jury; Wilson & Lawrence appeared as attorneys for plaintiff, and Keith, Evans, Thompson & Fairchild and

J. H. Howe appeared as attorneys for defendant railway company; whereupon the following proceedings were had, to wit:

An exemplified copy of the plat of three islands in sections 15 and 22, township 29 north, of range 24 west, of the fourth meridian, being lot nine (9), in section 15, and lots eight (8), nine (9), and ten (10), in section 22 aforesaid, surveyed by S. H. Baker, deputy surveyor, under special instructions dated October 21st, 1882, duly certified to be a true and correct copy of the original plat on file in the surveyor general's office of Minnesota by John F. Norrish, United States surveyor general for Minnesota, and by C. F. Wilkins, register of the United States land office at Benson, Minnesota, was offered in evidence and received without objection for the purpose of identifying the premises in question; and it was agreed that the lands in issue in this action were the same lands mentioned and described in this plat and in the patent hereinafter referred to. Said plat showed the location of the premises in dispute in the Mississippi river, near the mouth of Bassett's creek.

Plaintiff offered in evidence the original patent of the premises in question from the United States to John Van Anker, together with the certificate of record upon the back thereof from the office of the register of deeds of Hennepin county.

Objected to by defendants as incompetent, irrelevant, and immaterial, and because it appears upon the face of the patent itself that the same is void for want of authority of the President of the United States to execute it; which objection was sustained by the court; to which plaintiff duly excepted.

10 A copy of said original patent, and certificate of record is hereto attached and marked Exhibit "B."

Plaintiff offered in evidence certified copies of the proceedings prior to the issuance of said patent from the United States land office at Benson, to which defendants objected upon the same ground as before. The objection was sustained by the court, and the plaintiff duly excepted to the same.

A copy of which papers offered in evidence is hereto attached and marked Exhibit "C."

Plaintiff offered in evidence a power of attorney from said John Van Anker to sell and convey the premises in question to D. M. Smith of Minneapolis, Minnesota; a copy of which is hereto annexed and marked Exhibit "D," which was objected to as incompetent, irrelevant, and immaterial; which objection was sustained, and plaintiff duly excepted.

Plaintiff then offered in evidence a deed from John Van Anker and wife to the plaintiff herein, together with the certificate of record in the office of the register of deeds of Hennepin county, copies of which are hereto annexed and marked Exhibit "E;" which was objected to as incompetent, irrelevant, and immaterial, and no foundation laid; the objection was sustained by the court, and plaintiff duly excepted.

William Burfenning was called as a witness on behalf of plaintiff and duly sworn.

Plaintiff offered to show by this witness that the land in question

is and was at the time of the commencement of this action worth $20,000, and that the use thereof is and was worth $100 per month.

Defendant objected to the introduction of such testimony as immaterial and incompetent; which objection was sustained, and plaintiff duly excepted

Plaintiff also offered to show by the witness that he had
11 demanded possession of the property in question from the defendant prior to the commencement of this action, and that the same was refused. Which was also objected to by defendant on the same ground as before; objection sustained, and plaintiff duly excepted.

Whereupon plaintiff rested.

Defendant rested.

Thereafter and upon the same day the court filed its findings and decision in favor of the defendant.

EXHIBIT "B."

Homestead certificate No. 5590, application 11395.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Benson, Minnesota, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of John Van Anker has been established and duly consummated, in conformity to law, for the lot numbered nine of section fifteen and the lots numbered eight, nine and ten of section twenty-two in township twenty-nine north of range twenty-four west of the fourth principal meridian in Minnesota, containing one acre and ninety-five hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general.

Now know ye, that there is, therefore, granted by the United States unto the said John Van Anker the tract of land above described.

To have and to hold the said tract of land, with the ap-
12 purtenances thereof unto the said John Van Anker and to his heirs and assigns forever.

In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the thirteenth day of June, in the year of our Lord one thousand eight hundred

and eighty-four, and of the Independence of the United States the one hundred and eighth.

By the President:

CHESTER A. ARTHUR,
By W. H. CROOK, *Secretary.*

[United States General Land Office Seal.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded, vol. 12, page 320.

Office of the register of deeds, county of Hennepin, State of Minnesota.

I hereby certify that the within patent was filed for record in this office on the 21st day of February, A. D. 1888, at 10½ o'clock a. m., and was duly recorded in Book 245 of Deeds, page 117.

JNO. F. PETERSON,
Register of Deeds,
By W. A. PLUMMER, *Deputy.*

EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September 13th*, 1888.

I, T. J. Anderson, acting Commissioner of the General Land Office, do hereby certify that the annexed copies from the homestead entry papers, Benson, Minnesota, F. C., No. 5590, in the name of John Van Anker, are a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name
13 and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[United States General Land Office Seal.]

T. J. ANDERSON,
Acting Commissioner of General Land Office.

Receiver's receipt No. 11395, application No. 11395.

Homestead.

RECEIVER'S OFFICE, BENSON, MINN., *March* 27, 1883.

Received of John Van Anker the sum of five dollars, ten cents, being the amount of fee and compensation of register and receiver for the entry of lots 9 of sec. 15, and the lots 8, 9 and 10 (islands of Mississippi river) of section 22, in township 29 north, of range 24 west, 4th P. M., under section No. 2306 Revised Statutes of the United States. Additional to 915, final 2087, Kirwin, Kansas.

$5.10.

H. W. STONE, *Receiver.*

Final receiver's receipt No. 5590, application No. 11395.

Homestead.

RECEIVER'S OFFICE, BENSON, MINN., *March* 27, 1883.

Received of John Van Anker the sum of —— dollars, ten cents, being the balance of payment required by law for the entry of lot 9 of sec. 15, and the lots 8, 9 and 10 (islands in the Mississippi river) of sec. 22, in township 29 north, of range 24 W., 4th P. M., containing one and $\frac{95}{100}$ acres, under section 2306 of the Revised Statutes of the United States. Additional to 915, final 2087, Kirwin, Kansas.

$ .10.

H. W. STONE, *Receiver.*

14 Final certificate No. 5590, application No. 11395.

Homestead.

LAND OFFICE AT BENSON, MINN., *March* 27, 1883.

It is hereby certified that, pursuant to the provisions of section No. 2306, Revised Statutes of the United States, John Van Anker has made payment in full for lot 9 of sec. 15, and the lots 8, 9 and 10 of section No. 22, in township No. 29, of range No. 24 W., 4th P. M., containing one and $\frac{95}{100}$ acres, the same being islands in the Mississippi river.

Now, therefore, be it known that on the presentation of this certificate to the Commissioner of the General Land Office the said John Van Anker shall be entitled to a patent for the tract of land above described.

Additional to 915, final 2087, Kirwin, Kansas.

D. S. HALL, *Register.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 19th*, 1882.

In accordance with official circular issued from this office, dated May 17, 1877, I, L. Harrison, acting Commissioner of the General Land Office, do hereby certify that John Van Anker, who made original homestead entry No. 915, at Cawker City, Kansas, dated April 7, 1873, containing 155 and $\frac{11}{100}$ acres, is entitled to an additional homestead entry of not exceeding four and $\frac{89}{100}$ acres, as provided in section 2306, Revised Statutes of the United States.

L. HARRISON,
Acting Commissioner General Land Office.

(This conflict cannot be used in the entry of any subdivision of land, except when the excess shall be less than the area herein certified to.)

15 *Additional Entry under Section 2306 of the Revised Statutes of the United States.*

Application No. 11395.

LAND OFFICE, BENSON, MINN., *March* 27, 1883.

I, John Van Anker, of Smith county, State of Kansas, being entitled to the benefits of section 2306 of the Revised Statutes of the United States, granting additional lands to soldiers and sailors who served in the war of the rebellion, do hereby apply to enter the lots 9 of section 15, the lots 8, 9 and 10 of section 22, township 29, range 24 W., 4th P. M. (islands in Mississippi river) as additional to my original homestead on the E. ½ of N. E. — sec. 12, township 3, range 12 W., and west ½ of N. W. — of section No. 7, in township No. 3 S., of range 11, which I entered April 7th, 1873, per homestead No. 915, final proof No. 2087, at Kirwin, Kansas.

JOHN VAN ANKER.

LAND OFFICE, BENSON, MINN., *March* 27, 1883.

I, D. S. Hall, register of the land office at Benson, Minnesota, do hereby certify that John Van Anker filed the above application before me for the tract of land therein described, and that he has paid the fee and commissioners prescribed by law.

D. S. HALL, *Register.*

Additional Homestead—Affidavit.

LAND OFFICE AT ——, 188–.

I, John Van Anker, of Smith Co., Kansas, having filed my application No. —, for an additional entry under the provisions of section 2306 of the Revised Statutes of the United States, do solemnly swear that on the 7th day of April, 1873, I made a homestead entry of 155 acres of public land at the U. S. land office at Cawker City, Kansas, per application No. 915; that I have faithfully complied
16 with the requirements of the law in respect to said original homestead No. 915; that the same is now in good and regular standing upon the records of the land office of Kirwin, Kansas; that I have never abandoned or relinquished an entry made under the provisions of the homestead laws; that this additional entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever; and, further, that I have not made, nor agreed to make, any sale, transfer, pledge, or other disposition of my right to make the entry for which I now apply, or of the land which I apply to enter.

JOHN VAN ANKER, *Claimant.*

Sworn to and subscribed this 7th day of June, 1882, before L. A. Fairchild, clerk district court.

NOTE.—This affidavit must be acknowledged before one of the following officers, viz: A district land officer, a judge or clerk of the court of the county in which the party resides.

Additional Homestead—Special Affidavit as to Military Service, Identity, etc.

LAND OFFICE AT ——, 188–.

I, John Van Anker, of Smith Co., Kansas, do solemnly swear that I am the identical person who was mustered into the military service of the United States under the name of John Van Anker, in Co. G, 12th reg't of Michigan infantry volunteers, on the 18th day of November, 1861, and was honorably discharged from service on the 8th day of December, 1863.

I further solemnly swear that I am the identical person who made original homestead entry No. 915, at Cawker City, Kansas; that I now make application for an additional homestead entry,
17 having fully met all the requirements of the homestead law as to said original entry; that I have not sold my additional homestead claim, and that I have not made any prior application for an additional homestead certificate.

My post-office address is Lebanon, Smith Co., Kansas.

JOHN VAN ANKER, *Claimant.*

(Two witnesses to signature:)
C. H. WINE.
C. E. ROBERTS.

Sworn to and subscribed this 7th day of June, 1882.

L. A. FAIRCHILD,
Clerk District Court.

The undersigned do solemnly swear that we have been well acquainted with said John Van Anker, who made the above affidavit, for about twenty years, and that we have reason to know that his statements in said affidavit are true.

J. H. JOHNSON,
JAMES JOHNSON,
Two Corroborating Witnesses.

Sworn and subscribed to this 7th day of June, 1882.

L. A. FAIRCHILD,
[SEAL.] *Clerk District Court.*

To all whom it may concern:

Know ye that John Van Anker, a private — of Captain ——, Company G, in 12th regiment of Michigan infantry volunteers, who was enrolled on the eighteenth day of November, one thousand eight hundred and sixty-one, to serve three years, or during the war, is hereby discharged from the service of the United States this eighth day of December, 1863, at Benton barracks, Mo., by reason of surgeon's certificate of disability.

Said John Van Anker was born in German, in the State of
18 New York; is 45 years of age, 5 feet 10 inches high, light com-

plexion, blue eyes, gray hair, and by occupation when enrolled a farmer.

Given at Benton B., Mo., this eighth day of December, 1863.

B. L. E. RAMVILLE,
Col. U. S. A., Commanding Post.

(Endorsed as follows across the face thereof:)

"Paid by Robert Smith, of Illinois, Dec. 18, 1863, St. Louis, paymaster U. S. A."

"Paid $100.00 bounty."

"Chronic rheumatism and general physical debility from advanced age and broken-down constitution."

STATE OF KANSAS, }
County of Smith, } *ss:*

I, L. A. Fairchild, clerk of the district court in and for the county and State above written, do hereby certify that the foregoing copy of the discharge of John Van Anker has been carefully copied and compared, and is a true and correct copy of the original which has this day been presented to me, in the hand of John Van Anker.

Witness my hand as the clerk aforesaid, with the seal of said court hereto attached, the 7th day of June, 1882.

[SEAL.] L. A. FAIRCHILD.

WAR DEPARTMENT, ADJ'T GENERAL'S OFFICE,
WASHINGTON, D. C., *July 18th*, 1882.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th day of June, 1882, requesting a "statement of service" of John Van Anker.

The following information has been obtained from the files of this office, and is respectfully furnished in reply to your inquiry. It appears from the rolls on file in this office that John Van
19 Anker was enrolled on the 18th day of November, 1861, at Alaiedan, in Co. "G," 12th regiment of Michigan volunteers, to serve 3 years, or during the war, and mustered into service as a corporal on the 5th day of March, 1862, at Niles, in Co. "G," 12th regiment of Michigan volunteers, to serve 3 years, or during the war.

On muster-roll of January and February, 1864. Discharged the service Dec. 8, 1863, at St. Louis, Mo., a private. Not borne as John Van Anker.

Certificate of disability reports him discharged at "Benton barracks, Mo., December 8th, 1863, because of chronic rheumatism and general physical incapacity from advanced age and broken constitution;" is 57 years of age; off duty six months. Unfit for duty in the invalid corps.

I am, sir, very respectfully, your obedient, servant.

C. McKEEVER,
Assistant Adjutant General.
D. MOHN.

To Commissioner Gen'l Land Office, Washington, D. C.

EXHIBIT "D."

Power to Sell.

Know all men by these presents, that I, John Van Anker of the county of Smith, State of Kansas, married, do hereby make, constitute, and appoint B. M. Smith, of Minneapolis, Minn., my true and lawful attorney, hereby authorizing and empowering my said attorney to sell upon such terms as to him shall seem meet, any lands obtained by me as an "additional homestead," under the provisions of section 2306 of the Revised Statutes of the United States, to my original homestead on E. ½ N. E. 12-3-12, and W. ½ N. W., sec. 7, township 3 of range 11 W., Kansas, and to sell any such lands as I may hereafter acquire under said section, and to receive the purchase-money or other consideration therefor, and upon such sale to make, sign, seal, and deliver in my name, all such deeds or
20 other assurances in the law therefor, as to him shall seem meet and necessary, hereby empowering him to fill all blanks herein.

And I further authorize and empower my said attorney to receive, accept, and take possession of the lands hereinafter mentioned as additional to my original homestead above, and to prosecute and defend, at his own cost, any suit or action respecting the same, or for the breach of my contract in relation thereto, or for any trespass thereupon or injury thereto, of any nature or description whatsoever.

And my said attorney is hereby authorized to sell said lands, or any interest therein, and to make any contract in relation thereto, which I might make if present; and to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands, or any interest therein, or arising from any contract in relation thereto, or received or recovered for any injury thereto; and I hereby release to my said attorney all claim to any of the proceeds of any such sale, lease, contract or damages; hereby agreeing that I will, at any time, without further consideration, execute, acknowledge, and deliver, or cause to be executed, acknowledged, and delivered, such further assurances of title to said property as said attorney, substitutes or assigns, may require.

And I further authorize my said attorney to appoint a substitute or substitutes to perform any of the foregoing powers.

And in consideration of the sum of twenty-five dollars, lawful money, to me in hand paid by the said B. M. Smith, the receipt whereof is hereby acknowledged, this power of attorney and each and every power contained herein is made and hereby declared to be irrevocable by me or in my name or otherwise. The lands hereinbefore referred to are the following, viz: lot nine (9), section fifteen (15), and lots eight (8), nine (9), and ten (10) of section twenty-
21 two (22), township twenty-nine (29) north, of range twenty-four (24) west, of 4th P. M., containing 1.95 acres according to Government survey.

Hereby ratifying and confirming all that my said attorney, or

his substitute, may lawfully do or cause to be done by virtue of these presents.

And I, Elzina Van Anker, wife of said John Van Anker, do execute this instrument in token of my release of dower and of homestead exemption, and of any other claim that I may have in or to said additional homestead entry, or right of entry.

Signed, sealed and delivered at ——, in the county of Smith, State of Kansas, in presence of the subscribing witnesses, on this 7th day of June, 1882.

JOHN VAN ANKER. [SEAL.]

her
ALZINA x VAN ANKER. [SEAL.]
mark.

Attest: C. H. WINE.
Attest: C. E. ROBERTS.

STATE OF KANSAS, } ss:
County of Smith, }

On this 7th day of June, in the year 1882, before me, the undersigned, clerk of district court in and for the county of Smith and State of Kansas, authorized to administer oaths and to take acknowledgments of deeds and other instruments, personally appeared John Van Anker and Alzina Van Anker, his wife, well known to me as the person- who executed the above, as parties thereto, who then and there acknowledged to me that they freely executed the same for the purposes therein set forth. And the said wife, having been by me made acquainted with the contents of said instrument, acknowledged to me, out of the presence and hearing of her husband, that she had executed the same freely, without im-
22 proper influence by her husband and did not wish to revoke it.

Witness my hand and seal at the time and place above stated.

[SEAL.] L. A. FAIRCHILD,
Clerk District Court.

Office of register of deeds, county of Hennepin, State of Minnesota.

I hereby certify that the within — was filed for record in this office on the 9th day of July, A. D. 1883, at 2½ o'clock p. m., and was duly recorded in Book "C" of Powers, page 543.

GEO. HUHN,
Register of Deeds,
By J. E. MERRITT, *Deputy.*

EXHIBIT "E."

This indenture, made this twenty-ninth day of June, A. D. one thousand eight hundred and eighty-three, between John Van Anker and Alzina Van Anker, his wife, of the county of Smith and State of Kansas, parties of the first part, and William Burfenning, of the

county of Hennepin and State of Minnesota, party of the second part,

Witnesseth, that the said parties of the first part, in consideration of the sum of twenty-five ($25.00) dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey to the said party of the second part, his heirs and assigns forever, all the following-described piece or parcel of land lying and being in the county of Hennepin, State of Minnesota, to wit, lot nine (9) of section fifteen (15), and lots eight (8), nine (9) and ten (10) (being islands in the Mississippi river above the falls at Minneapolis,
23 in said county and State, and between the railroad bridge and the wagon bridge above it) of section twenty-two (22), township twenty-nine (29) north, of range twenty-four (24) west, of the fourth (4th) P. M., containing one and ninety-five (1.95) acres according to Government survey.

To have and to hold, together with all the hereditaments and appurtenances thereunto in anywise appertaining. And the said John Van Anker and wife, parties of the first part, do covenant with the said party of the second part, his heirs and assigns, as follows: That they are lawfully seized of said premises, in fee-simple, and that they have good right and power to grant and convey the same; that the same is free from all incumbrances, and that the said party of the second part, his heirs and assigns, shall quietly enjoy and possess the same, and that the said parties of the first part will warrant and defend the title to the same against all lawful claims.

In testimony whereof, the said parties of the first part hereunto set their hands and seals the day and year first above written.

JOHN VAN ANKER, [SEAL.]
ALZINA VAN ANKER, [SEAL.]
By B. M. SMITH,
Their Attorney-in-fact.

Signed, sealed and delivered in presence of—

ALEX. MoBECK.
L. WEINARD.

STATE OF MINNESOTA, }
County of Hennepin, } ss:

On this 29th day of June, A. D. 1883, before me, the undersigned, personally came B. M. Smith, to me personally known to be the attorney-in-fact of John Van Anker and Alzina Van Anker, his wife, and the identical person who executed the foregoing deed, and he acknowledged that he executed the same freely and volun-
24 tarily, for the uses and purposes therein expressed, as the free act and deed of the said John Van Anker and Alzina Van Anker, his wife.

[NOTARIAL SEAL.] ALEX. MoBECK,
Notary Public, Hennepin County, Minnesota.

Office of register of deeds, county of Hennepin.

I hereby certify that the within deed was filed in this office for record on the 9th day of July, A. D. 1883, at 2½ o'clock p. m., and was duly recorded in Book "129" of Deeds, page 372.

GEO. HUHN,
Register of Deeds,
By J. E. MERRITT, *Deputy.*

Filed March 19, 1890.

C. B. TIRRELL, *Clerk,*
By C. N. DICKEY, *Deputy.*

The foregoing having been examined by me and found to contain all the evidence given and produced at the trial of said case, and the same being found to conform to the truth, is hereby allowed as a settled case herein.

FREDERICK HOOKER, *Judge.*

Dated March 15, 1890.

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial Dist.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and THE HALL & DUCEY LUMBER COMPANY, Defendants.

To Messrs. Keith, Evans, Thompson & Fairchild and J. H. Howe, Esq., attorneys for defendants.

25 GENTLEMEN: Please take notice that on Wednesday, the 19th day of March, A. D. 1890, we shall apply to the above-named court, and move for a new trial of the above-entitled action, on the ground of errors in law occurring at the trial and duly excepted to by the plaintiff.

Said motion will be based upon the files in said action and upon the settled case herein.

Yours, etc.,
WILSON & LAWRENCE,
Attorneys for Plaintiff.

Filed Mar. 19, 1890.

C. B. TIRRELL, *Clerk,*
By C. N. DICKEY, *Deputy.*

Due service of the within is hereby admitted this 19th day of March, 1890.

J. H. HOWE & R. G. EVANS,
Att'ys for Def't.

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial Dist.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and THE HALL & DUCEY LUMBER COMPANY, Defendants.

The above-entitled matter having come on before the court this 19th day of March, 1890, by agreement of counsel, upon a motion for a new trial of the above-entitled action, Messrs. Wilson & Lawrence appearing on behalf of the plaintiff, and Messrs. Keith, Evans, Thompson & Fairchild and J. H. Howe, Esq., appearing for the defendants; and the court being fully advised in the premises, and duly considering the matter, it is ordered, that said motion be and the same is hereby denied.

By the court:

FREDERICK HOOKER, *Judge.*

Dated March 19, A. D. 1890.

Filed March 19, 1890.

C. B. TIRRELL, *Clerk,*
By C. N. DICKEY, *Deputy.*

26 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial Dist.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY *et al.*, Defendants.

To Messrs. Keith, Evans, Thompson & Fairchild and J. H. Howe, Esq., attorneys for said defendant, and to C. B. Tirrell, Esq., clerk of the above-named district court:

You will please take notice that the above-named plaintiff, William Burfenning, appeals to the supreme court of the State of Minnesota from the order of the said district court entered herein on the 19th day of March, A. D. 1890, denying the motion for a new trial of the above-entitled action, and from the whole thereof.

WILSON & LAWRENCE,
Attorneys for Plaintiff.

Dated March 20th, A. D. 1890.

Filed March 20, 1890.

C. B. TIRRELL, *Clerk.*

Due notice of the above notice of appeal is hereby admitted this 20th day of March, A. D. 1890.

R. G. EVANS,
J. H. HOWE,
Attorneys for Defendant Railway Co.
C. B. TIRRELL,
Clerk of District Court.

A due and proper bond on appeal has been filed with the clerk of said court and served upon the attorneys for the respondent.

WILSON & LAWRENCE,
Attorneys for Appellant.

27 *Mandate.*

STATE OF MINNESOTA, *Supreme Court,* } ss:

The State of Minnesota to the hon. judge and officers of the district court of the fourth judicial district, sitting within and for the county of Hennepin, Greeting:

Whereas lately, in your court, in an action therein pending, wherein William Burfenning was plaintiff and Chicago, St. Paul, Minneapolis & Omaha Railway Company defendant, a certain order was entered therein March 19th, 1890, from which order said plaintiff appealed to this court;

And whereas the same was duly argued, heard, and submitted at the general October term, A. D. 1890, of our supreme court; after mature deliberation thereupon had, our supreme court did adjudge, determine, decree, and order "that the order of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent, defendant above named, have judgment accordingly;" a copy of the entry of judgment thereupon in this court is herewith transmitted and made part of this remittitur:

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court in said hereinbefore-mentioned cause, and the same is hereby and herewith remanded to your court for such other or further record and proceedings therein as may be by law necessary, just, and proper under and by virtue of the said order herein made.

Witness the Hon. James Gilfillan, chief justice of the supreme court aforesaid, and the seal of said court, at St. Paul,
28 this 11th day of May, A. D. 1891.

[SEAL OF SUPREME COURT.]

C. P. HOLCOMB,
Clerk of the Supreme Court.

(Filed Jun- 23, 1891. C. B. Tirrell, clerk, by G. G. Tirrell, deputy.)

29 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

WILLIAM BURFENNING, Pl'ff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and THE HALL & DUCEY LUMBER COMPANY, Def'ts.

Amount of judgment or verdict, ——.

Costs and Disbursements.

Statutory costs	$10 00
2 affidavits	50
— acknowledgments	
Sheriff's fees	
Jury fees	
Clerk's fees (to be taxed)	2 03
The above bill of costs and disbursements taxed and allowed at	$12 53

Dated April 28, 1892.

C. B. TIRRELL, *Clerk*,
By C. N. DICKEY, *Deputy*.

Affidavit of Disbursements.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

Robert G. Evans, being duly sworn, says he is one of the attorneys of the defendant- in the above-entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said defendant- in the above-entitled action, and that all of the items thereof have been actually and necessarily paid or incurred
30 therein by and on behalf of said defendant-, and that each of the above-named witnesses was a material witness for the — in said action, and that he necessarily traveled the number of miles set opposite his name going from his said place of residence to and returning from the place of trial and necessarily attended the number of days set opposite his said name.

ROBERT G. EVANS.

Subscribed and sworn to before me this 22nd day of April, 1892.

[NOTARIAL SEAL.] ARTHUR M. KEITH,
Notary Public, Hennepin County, Minn.

31 *Notice of Taxation of Costs.*

STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

WILLIAM BURFENNING, Pl'ff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and THE HALL & DUCEY LUMBER CO., Def'ts.

SIR: Please take notice that on the 28th day of April, 1892, at 10 o'clock a. m., application will be made to the clerk of said court, at his office, in the court-house, in the city of Minneapolis, in the county of Hennepin and State of Minnesota, to have the within bill of costs and disbursements taxed and inserted in the judgment then and there to be entered herein.

Dated April 22, 1892.

Yours respectfully,

J. H. HOWE &
R. G. EVANS,
Attorneys for Defendants.

To Messrs. Wilson & Lawrence, attorneys for pl'ff.

(Filed April 28th, 1892. C. B. Tirrell, clerk, by G. G. Tirrell, deputy.)

Due service of the within bill of disbursements and affidavit to same and notice of taxation thereof is hereby admitted this 23rd day of April, 1892.

WILSON & LAWRENCE,
JAS. W. LAWRENCE,
Attorney for Pl'ff.

32 STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and THE HALL & DUCEY LUMBER COMPANY, Defendants.

Judgment.

This case, being regularly upon the calendar of the above-named court for the April, 1889, term thereof, came on for trial before the court, a jury having been waived, on the 27th day of June, A. D. 1889, Messrs. Wilson & Lawrence appearing for plaintiff and Messrs. J. H. Howe and R. G. Evans for the defendants; and the court,

after hearing the evidence adduced at said trial and being fully advised in the premises, on the 27th day of June, 1889 duly made and filed its findings and order for judgment herein.

Now, pursuant to said order and on motion of J. H. Howe and R. G. Evans, Esquires, attorneys for the defendants above named—

It is hereby adjudged and decreed that the plaintiff in the above-entitled action is not the owner nor entitled to the possession of the real estate in the complaint in this action described, and that he take nothing by his action herein against said defendant, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, and that said defendant, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, recover of and from said plaintiff its costs, hereby allowed and taxed at the sum of $12.53, and that as to the defendant The Hall & Ducey Lumber Company said action be, and hereby is, dismissed.

33 Dated this 28th day of April, 1892.

By the court:

C. B. TIRRELL, *Clerk*,
By GEO. G. TIRRELL, *Deputy*.

(Filed April 28th, 1892, at 4 p. m. C. B. Tirrell, clerk, by G. G. Tirrell, deputy.)

34 STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY *et al.*, Defendants.

To R. G. Evans, attorney for the above-named defendant-, and G. G. Tirrell, clerk of the district court:

Please take notice that the above-named plaintiff appeals to the supreme court of the State of Minnesota from the judgment of the said district court entered herein on the 28th day of April, 1892, and from the whole thereof.

Dated this 13th day of May, A. D. 1892.

WILSON & LAWRENCE &
JAS. W. LAWRENCE,
Attorneys for Plaintiff.

Due service of the within notice of appeal is hereby admitted this 18th day of May, A. D. 1892.

J. H. HOWE AND
R. G. EVANS,
Attorneys for Def'ts.
G. G. TIRRELL, *Cl'k*,
By C. B. TIRRELL, *Dpty*.

(Filed June 30, 1892. G. G. Tirrell, cl'k, by C. B. Tirrell, dpty.)

35 STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

WILLIAM BURFENNING, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY *et al.*, Defendant-.

Know all men by these presents that William Burfenning, as principal, and Fred. Massolt and August Massolt, as sureties, are held and firmly bound unto Chicago, St. Paul, Minneapolis & Omaha Railway Company in the sum of two hundred & fifty ($250.00) dollars, lawful money of the United States, to be paid unto the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors or assigns; for which payment, well and truly to be made, we jointly and severally bind ourselves and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 13th day of May, A. D. 1892.

The condition of this obligation is such that whereas the said William Burfenning has appealed to the supreme court of the State of Minnesota from the judgment entered in the above-entitled action April 28th, 1892:

Now, therefore, if the said William Burfenning shall and does pay all costs and charges which may be awarded against him on this appeal, then this obligation to be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands and seals this 13th day of May, A. D. 1892.

WILLIAM BURFENNING. [SEAL.]
FRED. MASSOLT. [SEAL.]
AUGUST MASSOLT. [SEAL.]

Signed, sealed, and delivered in presence of—

W. P. CLEATOR.
HENRY KUEHN.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 13th day of May, A. D. 1892, before me, a notary public within and for said county, personally appeared William Burfenning, Fred. Massolt, and August Massolt, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[SEAL.]

W. P. CLEATER,
Notary Public, State of Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Fred. Massolt and August Massolt, being duly sworn, say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of the State of Minnesota and worth the amount of two hundred & fifty ($250.00) dollars, specified in the within bond, above his debts and liabilities and exclusive of his property exempt from execution; and each affiant further
36 says on oath that he is worth double the amount specified in the within bond.

FRED. MASSOLT.
AUGUST MASSOLT.

Subscribed and sworn to before me this 13th day of May, 1892.
[SEAL.] W. P. CLEATOR,
Notary Public, Hennepin County, Minnesota.

Due service of within bond by copy thereof hereby admitted this 18th day of May, 1892, at Minneapolis.

J. H. HOWE &
R. G. EVANS,
Attorneys for Def'ts.

Filed June 30, 1892.

G. G. TIRRELL, *Clerk,*
By C. B. TIRRELL, *Deputy.*

I hereby approve the within bond and the sureties therein named. Dated May 18th, 1892.

HENRY G. HICKS,
Judge of said Court.

37 STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, 4th Judicial District.

I, C. N. Dickey, clerk of the above-named court, do hereby certify that I have compared the papers-writing to which this certificate is attached with the original summons, complaint, answers of Hall & Ducey Lumber Co., Chicago, St. Paul, M. & O. R'y Co., settled case, notice of motion for new trial, order denying same, notice of appeal, mandate, affidavit of costs and disbursements and notice of taxation of costs, judgment, bond on appeal, notice of appeal to Supreme Court in the action therein entitled as the same appears of record and on file in the said clerk's office, at the court-house, in said Hennepin county, Minnesota, and find the same to be a true and correct copy thereof.

Seal District Court. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Minneapolis, this 24th day of March, A. D. 1893.

C. N. DICKEY, *Clerk,*
By H. MOORE, *Deputy.*

Endorsed: District court, 4th judicial district, Hennepin county, Minnesota. Certified copy and return to supreme court. William Burfenning *vs.* Chicago, St. Paul, — & O. R'y Co. Filed March 27th, 1893. C. P. Holcomb, clerk.

38 State of Minnesota, Supreme Court, General April Term, A. D. 1893.

TUESDAY MORNING, 9.30 O'CLOCK, *April 4th, A. D.* 1893.

Court convened pursuant to adjournment, all the justices being present excepting Associate Justice Vanderburgh.

WILLIAM BURFENNING, Appellant,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO., Respondent.
} Cal. No. 45, Reg. No. 8249.

In this cause it is ordered, by consent of counsel, that the judgment of the court below herein appealed from be, and the same is, affirmed for the reason given in the opinion of this court upon the former appeal.

A true record.
Attest:
[Seal of Supreme Court, Minnesota.]
C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument and order in the above-entitled cause.
Attest: C. P. HOLCOMB, *Clerk.*

39 [Endorsed:] 8249. State of Minnesota, supreme court. Copy of minutes of argument. Filed June 28th, A. D. 1893. C. P. Holcomb, clerk.

40 State of Minnesota, Supreme Court, April Term, A. D. 1893.

WILLIAM BURFENNING, Appellant,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.
} No. 45.

Pursuant to an order of court duly made and entered in this cause on the fourth day of April, A. D. 1893—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the fourth judicial district, sitting within and for the county of Hennepin, be, and the same hereby is, in all things affirmed, for the reasons given in the opinion of this court upon the former appeal; and it is further determined and adjudged that the respondent above named do have and recover of said William Burfenning, appellant herein, the sum and amount of thirty-one & $\frac{50}{100}$ dollars

($31.50), costs and disbursements in this cause in this court, and the said respondent have execution for the enforcement thereof.

Dated and signed this 28th day of June, 1893.

By the court.

Attest: C. P. HOLCOMB, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees	
Clerk's fees, supreme court	6 50
Filing mandate and docketing transcript	
Affidavits and acknowledgments	
Postage	
Copying return for printer	
	$31 50

41 [Endorsed:] 8249. State of Minnesota, supreme court. Transcript of judgment. Filed June 28th, A. D. 1893. C. P. Holcomb, clerk. ——— ———, attorney for —. Page No. 132, "R" Book.

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Seal of Supreme Court, Minnesota.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this twenty-eighth day of June, A. D. 1893.

C. P. HOLCOMB, *Clerk.*

42 [Endorsed:] No. 8249. State of Minnesota, supreme court. William Burfenning, appellant, against Chicago, St. Paul, Minneapolis & Omaha Railway Company. Judgment-roll. Filed June 28th, 1893. (Seal of supreme court, Minnesota.) C. P. Holcomb, clerk.

43 6449.

State of Minnesota, Supreme Court, October Term, A. D. 1890.

WILLIAM BURFENNING, Appellant,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondents.
} No. 11. Syllabus.

Government lands included within the limits of any incorporated

town are not subject to pre-emption or homestead entry. The Land Department has no jurisdiction to allow such entries under any circumstances, and a patent issued upon a homestead entry of land included within that class is void.

The charter of the city of Minneapolis, which shows on its face what lands are included within the city, is made a public act, and the courts are bound to take notice of its provisions without proof and without notice of the act in the pleadings.

44 6449.

State of Minnesota, Supreme Court, October Term, A. D. 1890.

WILLIAM BURFENNING, Appellant,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondents.
} No. 11. Opinion.

In Minn. Land & Investment Co. *v.* Davis, 40 Minn., 455, 457 (42 N. W. Rep., 299), it appeared that the Secretary of the Interior had certified to the State, as provided by law, certain land-grant lands lying in place within the 10-mile limit of the grant to the Winona & St. Peter Railroad Company, and it was held that the title presumptively passed to the State, and if any particular tract, by reason of homestead or pre-emption claims thereon, should have been excepted from the certificate, which had the force and effect of a patent, the burden would have rested upon the party asserting an adverse claim to the land to seek in the appropriate action to have the error corrected. It was a matter within the jurisdiction of the Secretary of the Interior to certify such lands, and he had authority, as it was made his duty, to determine whether any particular parcels of land ought to be excepted. On the other hand, in Wilcox *v.* Jackson, 13 Pet., 498, 511, in a pre-emption case, the general doctrine was enunciated that, if the land officers undertake to grant pre-emptions of land in which the law declares they
45 shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction, and the court held such unauthorized *pre*-emption absolutely void. This case differs from the one first referred to, in that the United States land officers had not by law any jurisdiction to allow a pre-emption of that class of lands under any circumstances. This distinction runs through all the cases. Smelting Co. *v.* Kemp, 104 U. S., 636.

In the case at bar the plaintiff brings an action of ejectment against the defendant, alleging title to the premises in question, and the defendant answers, denying plaintiff's title and alleging ownership. The plaintiff must, therefore, recover upon the strength of his own title, which rests upon a patent purporting on its face to have been issued upon a homestead entry of the lands, under and in pursuance of the act of Congress of May 20, 1862. This patent was offered in evidence on the trial by the plaintiff, together with the homestead-entry papers, showing the application and proceed-

ings before the land officers. The evidence was rejected by the trial court, on the ground that the patent and all prior proceedings were void, and that it was issued without authority of law, and against the law. Only such lands may be taken and entered as homesteads under the laws of the United States as are subject to pre-emption; and by section 2258, Rev. St. U. S., it is declared that "the following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit: First, lands included in any reservation," etc.; "second, lands included within the limits of any incorporated town, or selected as the site of
46 a city or town; third, lands actually settled and occupied for purposes of trade and business and not for agriculture; fourth, lands on which are situated any known salines or mines."

It was obviously the purpose of the Government to exclude such lands as might be of peculiar or exceptional value. The lands in question here and described in the patent are Government lots 8, 9, and 10, in section 22, and Government lot 9, in section 15, in township 29 north, of range 24 west, in Minnesota, containing 1.95 acres. At the time this homestead application and entry were made the city of Minneapolis had been incorporated as a city, and the land in question was embraced within the limits thereof, as expressly appears by the charter, and the charter of the city at that time contained the following provision: "This city charter shall be a public act and need not be pleaded nor proved in any case." When the patent and homestead-entry papers were offered by plaintiff to establish his title, the court was bound to take notice of the city charter and of the fact that the lands were embraced within the limits of the city without proof and without notice of the fact in the pleadings. Covington Drawbridge Co. *v.* Sheperd, 20 How., 227, 232. It appeared, therefore, that the land upon which the patent was issued was within the second class above specified, and that the entry thereof was contrary to law. The evidence, therefore, was properly rejected. The Land Department had no jurisdiction to receive the application. There was no authority of law for initiating the proceedings. The land officers were bound to know the limits
47 of their jurisdiction, and both they and the applicant were bound to take notice of the fact that the land was within the limits of an incorporated city and not subject to pre-emption. All the material questions in this case are covered by the decision of Justice Miller in Root *v.* Shields, 1 Woolw., 340, 364, where it appeared that the defendant Shields had pre-empted and received a patent for land embraced within the limits of the city of Omaha, and the court held that the patentee, Shields, did not even take an equity, but that the entry was void; that he took nothing and could convey nothing to his grantees, and that both he and they were bound to know that fact.

Order affirmed.

VANDERBURGH, *J.*

To the Hon. James Gilfillan, chief justice, or one of the justices of the supreme court of the State of Minnesota:

Your petitioner, William Burfenning, respectfully states and represents and complaint that in the records and proceedings and also in the rendition of a certain judgment in a case commenced in the district court of Hennepin county, in the State of Minnesota, wherein William Burfenning was plaintiff and The Chicago, Saint Paul, Minneapolis & Omaha Railway Company, a corporation, was defendant, made and entered in the said district court on the 28th day of April, 1892, in favor of said defendant and against said plaintiff, and in the supreme court of the State of Minnesota, wherein said William Burfenning was appellant and The Chicago, Saint Paul, Minneapolis & Omaha Railway Company was respondent, affirming said judgment, which order, judgment, and affirmance *was* made, entered, and docketed in said supreme court of the State of Minnesota on the 28th day of June, 1893, in both which courts final judgment was rendered against said William Burfenning, plaintiff and appellant, and which said judgments determined and decreed that plaintiff was not the owner nor entitled to the possession of the premises described in the complaint therein, which premises were of the value of twenty thousand dollars ($20,000) and upwards and were situated in said county of Hennepin and State of Minnesota, which said courts were the highest court- of law or equity in said State of Minnesota in which a decision could be had in said proceedings, and in which a final judgment against said William Burfenning has been rendered and entered, manifest errors have occurred and wrongs been committed.

And your petitioner respectfully states and represents that in both said trials and proceedings in said district and supreme courts of the State of Minnesota there was drawn in question and decided by said court- the validity of a statute of the United States, to wit, sec.
49 2306 of Revised Statutes of U. S., and the decision of said courts is against the validity of such statute, and where was also drawn in question and determined an authority exercised under the said statute in issuing a patent for the lands described in the complaint under and pursuant to the Statutes at Large of the United States and the decision of said court- was against the validity thereof, and where was also drawn in question the title of said William Burfenning to the premises described in the complaint arising or growing out of the issuance of a patent under and pursuant to the Statutes at Large of the United States of the premises described in the complaint to the said William Burfenning's grantor and the decision is against the validity of such patent and the validity of such patent so issued; and your petitioner respectfully states and represents that said decision was in conflict with and repugnant to the said Statutes at Large of the United States and the Constitution of the United States.

And your petitioner respectfully represents and makes a part of this application the records and files in the office of the clerk of the said supreme court of the State of Minnesota.

And your petitioner further states and represents that he is a citizen and resident of the State of Minnesota, and that said Chicago, Saint Paul, Minneapolis and Omaha Railway Company is a corporation duly organized under and pursuant to the general laws of the State of Wisconsin.

And your petitioner alleges that all the matters and things above set forth fully appear by the record in the above-entitled proceeding.

Your petitioner therefore prays the allowance of a writ of error, returnable in the Supreme Court of the United States, and for a citation.

And your petitioner will ever pray.

WILLIAM BURFENNING, *Petitioner.*

LAWRENCE, TRUESDALE & CORRISTON,
Att'ys for Petitioner, Minneapolis, Minn.

50 Endorsed: 8249. Wm. Burfenning *vs.* C., St. P., M. & O. R'y Co. Petition. Filed August 1st, 1893. C. P. Holcomb, clerk. Lawrence, Truesdale & Corriston. James W. Lawrence, attorney and counselor at law, 238 to 242 Boston block, Minneapolis, Minn.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable justices of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in said supreme court of the State of Minnesota, before you, being the highest court of law or equity of the State of Minnesota in which a decision could be had in a suit between William Burfenning, plaintiff and appellant, and The Chicago, Saint Paul, Minneapolis & Omaha Railway Company, defendant and respondent, wherein was drawn in question the validity of a patent issued by the United States and the validity of a statute of the United States and an authority exercised under the laws of the United States and the decision was against their validity, *and* manifest error hath happened, to the great damage of said plaintiff, William Burfenning, as by his complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to a Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, to be then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States will cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme

Court of the United States, this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

Allowed by—
JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

52 [Endorsed:] 8249. Wm. Burfenning *vs.* C., St. P., M. & O. R'y Co. Writ of error. Filed August 1st, 1893. C. P. Holcomb, clerk. Lawrence, Truesdale & Corriston. James W. Lawrence, attorney and counselor at law, 238 to 242 Boston block, Minneapolis, Minn.

53 The United States of America to the Chicago, Saint Paul, Minneapolis & Omaha Railway Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein William Burfenning is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. James Gilfillan, chief justice of the supreme court of the State of Minnesota, this 14 day of July, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

54 [Endorsed:] 8249. Wm. Burfenning *vs.* C., St. P., M. & O. R'y Co. Citation. Original. Filed August 1st, 1893. C. P. Holcomb, clerk. Lawrence, Truesdale & Corriston. James W. Lawrence, attorney and counselor at law, 238 to 242 Boston block, Minneapolis, Minn.

55 Know all men by these presents that we, William Burfenning, as principal, and Fred. Massolt and August Massolt, of Minneapolis, in the county of Hennepin and State of Minnesota, as sureties, are held and firmly bound unto the Chicago, Saint Paul, Minneapolis & Omaha Railway Company in the full and just sum of $500.00 (five hundred), to be paid to the said Chicago, Saint Paul, Minneapolis & Omaha Railway Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, in the supreme court of the State of Minnesota, in a suit pending therein between said William Burfenning, as ap-

pellant, and The Chicago, Saint Paul, Minneapolis & Omaha Railway Company, as respondent, judgment was rendered in favor of said respondent therein and against the appellant therein, William Burfenning, ordering and decreeing a dismissal of the said action, which action was brought to recover the possession and eject the said respondent from the possession of certain real premises within the county of Hennepin and State of Minnesota, of the value of *fifteen* thousand dollars ($20,000) and upwards; and the said William Burfenning, the plaintiff and appellant above described, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Chicago, Saint Paul, Minneapolis & Omaha Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the second Monday of October next, and the said supreme court of the State of Minnesota being now in full possession and control of the entire and complete record in said case:

Now, the condition of the above obligation is such that if the said William Burfenning shall prosecute his writ of error to effect and answer to all costs and damages if he fail to make his plea
56 good, then this obligation to be void; else to remain in full force and vigor.

WILLIAM BURFENNING. [SEAL.]
FRED. MASSOLT. [SEAL.]
AUGUST MASSOLT. [SEAL.]

Signed, sealed, and delivered in presence of—
ROB'T PRATT.
GEO. HUHN.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Be it known that on this 7th day of July, A. D. 1893, personally came before me, Fred. Massolt and August Massolt, the sureties name- in the foregoing bond, and, being duly sworn, each for himself did depose and say that he is a resident of and freeholder within the State of Minnesota and is worth the sum of one thousand dollars ($1,000.00) over and above his debts and liabilities and exclusive of his property exempt from execution.

FRED. MASSOLT.
AUGUST MASSOLT.

Subscribed and sworn to before me this 7th day of July, A. D. 1893.

GEORGE HUHN,
[NOT'L SEAL.] *Notary Public, Hennepin County, Minnesota.*

57 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Be it known that on this 7th day of July, A. D. 1893, before me personally appeared William Burfenning, Fred. Massolt, and August Massolt, to me known to be the same persons described in and who executed the foregoing bond, and they duly acknowledged that they executed the same freely and voluntarily for the uses and purposes therein expressed.

GEORGE HUHN,
[NOT'L SEAL.] *Notary Public, Hennepin County, Minnesota.*

58 Endorsed: 8249. Wm. Burfenning *vs.* C., St. P., M. & O. R'y Co. Supersedeas bond. The foregoing bond & the sureties therein hereby approved by me this 14th day of July, A. D. 1893, & a writ of error allowed in said case. James Gilfillan, chief justice. Filed August 1st, 1893. C. P. Holcomb, clerk. Lawrence, Truesdale & Corriston. James W. Lawrence, attorney and counselor at law, 238 to 242 Boston block, Minneapolis, Minn.

59 State of Minnesota, Supreme Court.

WILLIAM BURFENNING, Plaintiff and Appellant,
vs.
CHICAGO, SAINT PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant and Respondent.

Now comes William Burfenning, the above-named plaintiff and appellant, by James W. Lawrence, and by Lawrence, Truesdale & Corriston, his attorneys, and says that in the records and proceedings of said supreme court and in the district court of Hennepin county, from which said case was removed to said supreme court on appeal, and each of them, there is manifest error, in this:

First. The court erred in excluding from evidence the original patent of the premises in question, issued by the United States to John Van Anker, together with the certificate of record thereof from the office of the register of deeds of Hennepin county,

Which was objected to by defendant, among other reasons, because it appears upon the face of the patent itself that the same is void for want of authority of the President of the United States to execute it;

Which objection was sustained by the court upon such ground, and to which plaintiff duly excepted.

Second. The court erred in excluding from evidence the certified copies of the proceedings prior to the issuance of said patent, to wit, certified copies of the homestead-entry papers issued from the United States land office located at Benson, in the State of Minnesota, and marked F. C. No. 5590, in the name of John Van Anker, and the receiver's receipt No. 11395, upon application number 11395, of homestead, issued by the receiver of the United States land office at Benson Minnesota;

And also the final receiver's receipt number 5590, upon the same application, issued from the receiver's office of the United States, located at Benson, in the State of Minnesota;

And also the final certificate number 5590, upon the same
60 homestead application, issued by the register of the United States land office located at Benson, in the State of Minnesota;

And also the certified copy of the paper issued by L. Harrison, as acting Commissioner of the General Land Office at Washington, in the District of Columbia, certifying that the said John Van Anker, who made the original homestead entry number 915 at Cawker City, Kansas, dated April 7th, 1873, containing 155.11 acres, is entitled to an additional homestead entry of not exceed- 4.89 acres, as provided in section 2306 of the Revised Statutes of the United States;

And also the certified copy of the additional entry under said section 2306 of the Revised Statutes of the United States upon said application number 11395 at the said United States land office located at Benson, Minnesota;

And also two affidavits of said John Van Anker with regard to his additional homestead, and also with regard to his military service and identity;

And also the certified copy of the discharge of said John Van Anker from the service of the United States, executed by B. L. E. Ramville, colonel United States Army, commanding post;

And also the certificate of C. McKeever, assistant adjutant general;

All said instruments being fully set forth in Exhibit "C" of the settled case herein; each and every one of which said instruments were offered in evidence upon the trial of said action and were objected to by the defendant therein as incompetent, irrelevant, and immaterial, and because it appeared upon the face of said instruments that the same were void; which objection was sustained by the court, and to which the plaintiff duly excepted.

Third. The court also erred in refusing to accept the evidence of the plaintiff as to the value of the premises in question and the value of the use thereof.

Which testimony was objected to by the defendant; which objection was sustained, and to which plaintiff duly excepted.

61 Fourth. The court below also erred in affirming the judgment and decision of the said district court herein.

And the said plaintiff and appellant avers that by reason of said errors drawing in question the validity of a statute of the United States and the validity of a patent to said premises in question, issued by the United States and signed by the President thereof, and drawing in question the validity of the proceedings upon the entry and location of said premises prior to the issuance of said patent, great and manifest injury hath been done to him and error committed.

And he prays that the judgment herein rendered against him in this action, for the errors aforesaid and the other many and manifest

errors in said *said* and proceedings aforesaid, may be reversed, cancelled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment.

Dated July 14th, A. D. 1893.

LAWRENCE, TRUESDALE & CORRISTON,
Attorney- for Plaintiff and Appellant.

62 Endorsed: 8249. Assignments of error. Filed September 18th, 1893. C. P. Holcomb, clerk. Lawrence, Truesdale & Corriston. James W. Lawrence, attorney and counselor at law, 238 to 242 Boston block, Minneapolis, Minn.

63 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, C. P. Holcomb, clerk of said supreme court, do hereby certify and return that the foregoing and annexed transcript of record is a full and complete transcript of the record, order affirming judgment, judgment, judgment-roll, opinion and syllabus, and all proceedings in said cause between William Burfenning, plaintiff and appellant, and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant and respondent, including also a copy of the petition for a writ of error, the original writ, with allowance of same; the original citation, a copy of the supersedeas bond, and a copy of the assignments of error to the Supreme Court of the United States, and the same constitutes and is the full and complete return to the writ of error issued and allowed in said cause.

Seal of the Supreme Court, State of Minnesota.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this nineteenth day of September, A. D. 1893.

C. P. HOLCOMB,
Clerk Supreme Court, State of Minnesota.

Endorsed on cover: Case No. 15,408. Minnesota supreme court. Term No., 277. William Burfenning, plaintiff in error, *vs.* The Chicago, St. Paul, Minneapolis & Omaha Railway Company. Filed September 29, 1893.

Office Supreme Court U. S.
FILED.
MAR 23 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 277.

WILLIAM BURFENNING, PLAINTIFF IN ERROR,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS AND POINTS AND AUTHORITIES FOR APPELLANT.

JAMES W. LAWRENCE,
Attorney for Appellant.

errors in said *said* and proceedings aforesaid, may be reversed, cancelled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment.

Dated July 14th, A. D. 1893.

LAWRENCE, TRUESDALE & CORRISTON,
Attorneys for Plaintiff and Appellant.

62 Endorsed: 8249. Assignments of error. Filed September 18th, 1893. C. P. Holcomb, clerk. Lawrence, Truesdale & Corriston. James W. Lawrence, attorney and counselor at law, 238 to 242 Boston block, Minneapolis, Minn.

63 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, C. P. Holcomb, clerk of said supreme court, do hereby certify and return that the foregoing and annexed transcript of record is a full and complete transcript of the record, order affirming judgment, judgment, judgment-roll, opinion and syllabus, and all proceedings in said cause between William Burfenning, plaintiff and appellant, and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant and respondent, including also a copy of the petition for a writ of error, the original writ, with allowance of same; the original citation, a copy of the supersedeas bond, and a copy of the assignments of error to the Supreme Court of the United States, and the same constitutes and is the full and complete return to the writ of error issued and allowed in said cause.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this nineteenth day of September, A. D. 1893.

Seal of the Supreme Court, State of Minnesota.

C. P. HOLCOMB,
Clerk Supreme Court, State of Minnesota.

Endorsed on cover: Case No. 15,408. Minnesota supreme court. Term No., 277. William Burfenning, plaintiff in error, *vs.* The Chicago, St. Paul, Minneapolis & Omaha Railway Company. Filed September 29, 1893.

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CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS AND POINTS AND AUTHORITIES FOR APPELLANT.

JAMES W. LAWRENCE,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 277.

WILLIAM BURFENNING, PLAINTIFF IN ERROR,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, DEFENDANT IN ERROR.

ASSIGNMENTS OF ERROR AND POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action in ejectment for real premises situated in Hennepin County. The case was heard by the trial court without a jury. Plaintiff claims under a warranty deed from one John Vananker, who obtained title to the premises by a patent from the government of the United States, dated June 30, 1884. The patent was issued under Section 2306 of R. S. of United States, under what is known as the "Additional Homestead Act."

It is not controverted that John Vananker had previously, on April 7, 1873, made a regular entry and received a patent for other premises less than 160 acres under Sec. 2304 of R. S. of United States, and that the amount of that claim added to the amount of land covered by this patent would not exceed 160 acres. The premises in dispute, admitted to be the same covered by this patent, are islands in the Mississippi river, a navigable stream. At the trial plaintiff offered in evidence said original patent of the premises with the certificate of record on its back. (see transcript of record, marked exhibit "B," Page 7.) Also certified copies of the proceedings prior to the issue of the patent from the United States Land Office, at Bers on, (marked ex-

hibit "C," page 8 of P. B.) Also power of attorney from said John Vananker to B. M. Smith to sell and convey premises in question (marked exhibit "D," page 13 of P. B.) Also a deed from said John Vananker and wife to the plaintiff of said premises with certificate of record (marked exhibit "E," page 14 of P. B.)

Plaintiff also offered to show by William Burfenning, who was duly called and sworn, the value of the land and the worth of its use.

Defendant objected to the introduction of each and all this testimony on the general ground that it was incompetent, immaterial and irrelevant, and for two special reasons. First, that it appeared on the face of the patent that the government officers had no authority to issue it. Second, that Vananker's original entry under Sec. 2304 was not made until after Sec. 2306 was passed, hence he could not have any additional right of entry, he not having "heretofore entered" on his original grant. These objections were made on the record to the patent (exhibit "B") and it is admitted that if the objections were well taken to the admissibility of that paper, the rest of the testimony was rightly excluded and *vice versa*.

The court sustained the objections and the defendant duly excepted.

No further testimony was offered by either party and the court found for the defendant without argument.

The appellant claims that said decision was the result of said erroneous rulings of the court. That said testimony was wrongfully excluded, and if it had been admitted the decision must have been for plaintiff.

This case was commenced and tried in the District Court of Hennepin County, Minn. It was twice appealed to the Supreme Court of the State. First, from an order of the court refusing to grant a new trial. Second, from the judgment entered. It was fully argued and determined upon the first appeal and the decision affirmed *pro forma* on the second.

ASSIGNMENTS OF ERROR.

Appellant assigns as error:

I.

The exclusion from evidence of the original patent of the premises in question to John Vananker together with the certificate of record

upon the back thereof from the office of the Register of Deeds of Hennepin County. (Fol. 11 of P. B., exhibit "B," Page .)

II.

The exclusion from evidence of certified copies of the proceedings prior to the issuance of said patent from the United States Land Office at Benson, Minn. (Exhibit "C," Fol. 13, &c.)

III.

The exclusion from evidence of the power of attorney from said John Vananker to sell and convey said premises in question to B. M. Smith, of Minneapolis, Minn. (Exhibit "D," Fol. 20.)

IV.

The exclusion from evidence of the deed from John Vananker and wife to the plaintiff herein, together with a certificate of record in the office of the Register of Deeds of Hennepin County. (Exhibit "E." Fol. 22 of P. B.)

V.

The refusal of the court to allow William Burfenning to testify as to the value of the premises in question and the value of its use.

POINTS AND AUTHORITIES.

As to the first assignment of error.

I.

The court erred in excluding the original patent on the ground that it appeared on its face that the president and officers of the United States had no authority to execute it and that it was therefore incompetent.

Sections 2257-8 of R. S. of United States provide that "all lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions and stipulation provided by law. "The following classes of lands unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption-to-wit: * * * *

Second, "Lands included within the limits of any incorporated town, or selected as the site of a city or town. * * * *

The argument of the defendant was, and the court so found, that the premises conveyed by the patent appeared by the description to be within the corporate limits of the city of Minneapolis, and therefore coming under the above exception, the patent was absolutely void. No objection was made to the paper except this.

It was admitted to be regular in all respects otherwise, and it is not claimed that government did not have the *title* to the land nor that it had not good right to dispose of it in some other way. In other words, it was a mere *mistake* on the part of the land office in disposing of this particular land by pre-emption under Sec. 2306.

Before considering the question of the conclusiveness of a government patent, we here make the point that the court erred in construing the patent at all at this stage of the case. There was no testimony in the case to show what the corporate limits of the city of Minneapolis included. The court must have taken *judicial notice* that the premises described in the patent were, in fact, included and *rightly* included within said corporate limits. But to take notice at that time that certain premises are within the city limits is to deprive appellant of his rights to contest the validity of the act by which the city of Minneapolis may have embraced said premises within its corporate limits, providing it had been shown by proof it had done so. Again, to have taken advantage at this time of the exception of Section 2257-8 and the Minneapolis City Charter, the matter should have been properly pleaded, which was not done.

But appellant takes the ground that in this case the patent is absolutely unassailable collaterally, and is conclusive between the plaintiff and defendant. And that the objection urged by respondent must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent.

The doctrine as to the presumptions attending a Government Patent is well settled, and while the decisions are numerous, they are uniform as to the effect to be given to a patent, regular on its face; the cases where the patent is considered conclusive, and also under what circumstances the patent can be collaterally attacked in an action at law.

In Smelting Co. vs. Kemp 104 U. S. 636, the decisions on this point are reviewed and both the general rule and the exceptions are ably and impartially laid down.

As far as our research goes this is the leading case on the points involved by this branch of the case, and because of this, and also for the reason that this case was the one most relied upon by the respondent at the trial, we call particular attention to it and the cases cited in it.

Without here quoting any part of it, we observe that this decision (pages 640-647 conclusive) contains the whole doctrine.

According to it, as far as this case is concerned, the law is that our patent is conclusive and unassailable unless it appears on its face to be invalid either when read in the light of existing law or by reason of what the court must take judicial notice of, for want of authority of the officers of the land department to issue it.

Assuming this decision to be good law we urge the following reasons why appellant's patent is within the rule and not among the exceptions:

First. The court cannot take judicial notice of the fact that the patent was improperly issued on land exempt by law from preemption.

Second. Respondent's remedy, if any, was to resort to a court of equity to annul the patent, but even there the objections must be properly pleaded.

"Courts of equity have power to set aside, cancel or correct patents obtained from the United States, but this can only be done by specific averments of the mistake supported by clear and satisfactory proofs."

Maxwell Land Grant Case, 121 U. S. 325.
Bagnell vs. Broderick, 13 Peters, 436.

"A patent," says the court in *U. S. vs. Stone, 2 Wall. 525*, "is the highest evidence of title and is conclusive as against the government and all claiming under junior patents or titles until it is set aside or annulled by some judicial authority."

Third, these premises were not "reserved from sale" according to the meaning of the terms so often used in the decisions.

That term has a general well defined meaning in land cases and at the land department, to-wit: Indian reservations, or land dedicated to some other purpose.

Fourth, if it be true that the premises are within the corporate limits of Minneapolis and so not subject to pre-emption under Sec. 2306 of U. S. Statutes, the issuance of patent was a *mistake* of the land department and is not reviewable in this action, for it is not denied that the government had title, and the action of the department in issuing a patent on this particular land, is *res adjudicata* it having decided that the land was subject to pre-emption, its action is not reviewable here.

> *Boggs vs. Merced Mining Co., 14 Cal. 279, 363. (Cited in Smelting Co. vs. Kemp, 104, U. S. p., 647)* and *Ehrhardt vs. Hogaboom, 115 U. S., p. 67.*

Fifth, respondent is a stranger to the title. He is a mere intruder as far as appears by the evidence. All the cases cited herein, are cases where there are other conflicting patents or where the party opposing the patent so connects himself with the original source of title as to be able to aver that his rights are injuriously affected by the existence of the patent. "It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it."

> *Smelting Co. vs. Kemp, Supra.*
> *Ehrhardt vs. Hogaboom, Supra.*
> *Boggs vs. Merced Mining Co., Supra.*
> *Moore vs. Wilkinson, 13 Cal., 479.*

Sixth. Vananker, the patentee was not made a party to the action. " * * He (patentee) would be a necessary party to any proceeding to avoid or set aside his patent on the ground that it was issued through fraud or misrepresentation. His rights cannot be determined or impaired in any side suit between third parties."

> *Boggs vs. Merced Mining Co., Supra.*

Other authorities on the above points:

> *Corbett vs. Wood, 32 Minn., 509.*
> *Kinney vs. Bode, 33 Minn., 450.*
> *Moore vs. Robbins, 96 U. S., 530.*
> *Polks Lessee vs. Wendell, 9 Cranch, 87.*

Sherman vs. Buick, 93 U. S., 209.
Patterson vs. Winer, 11 Wheaton, 380.
Lindsley vs. Hawes, 2 Black, 554.
United States vs. San Jacinto, 125 U. S., 273.

II.

The Statute Sec. 2258 expressly provides that certain classes of lands shall not be subject to the rights of pre-emption, viz:

First, lands included in any reservation, by any treaty, law or proclamation of the president for any purpose.

Second, land included within the limits of any incorporated town, or selected as the site of a city or town.

Third, lands actually settled and occupied for purposes of trade and business and not for agriculture.

Fourth, lands on which are situated any known salines or mines.

Besides these there are certain other lands not subject to the right of pre-emption, such as over-flowed or swamp lands, those set apart for school purposes, desert lands, etc.

All these lands withdrawn from entry are placed on a level and the prohibition of entry of such lands absolute, and as arbitrary and fixed for one class as another.

The land department has no more right to allow pre-emption and issue patents for land containing any known *salines* or *mines*, lands occupied for *purposes* of *trade* and *business*, or for *swamp lands*, *school lands* or *desert lands* than for *lands included in an incorporated town* or lands *reserved* by *treaty law* or *proclamation*.

All are *equally* prohibited and withdrawn.

It would seem that the same principles of law and rules of evidence should apply equally to a claimed pre-emption and patent for each class of such lands, and that the law should not make fish of one, flesh of another, and fowl of a third.

In other words, a patent actually issued for *any* such withdrawn lands, belonging to the government, should be either *void upon its face* or evidence of ownership in the patentee, until set aside or annulled by action of the government at law or otherwise.

We do not refer to those classes where there are conflicting and adverse claimants to lands both derived from the government, but only to those rules of law and evidence to be applied to patents issued

to a single claimant and to his rights as against all not holding a superior title, and to the legal effect of such patent and the presumptions arising from its issuance and contents.

And we maintain that *such patents* in *every case* and for all such classes of lands should have the same force, effect and standing in a court of law as *every other* patent.

We are aware that the courts have undertaken to draw some distinctions between the legal effect of such patents, which distinction is based upon the class or kind of land purporting to be conveyed.

So a patent for lands entered as agricultural lands, was held to be conclusive, and to convey a good government title when attacked by a person claiming the lands under an entry as known mining lands.

Scott vs. Lockey Luv. Co., 60 Fed., 34.
Steele vs. Refining Co., 106 U. S., 447.

The same rules of evidence and freedom from collateral attack are applied to patents of government lands where the patent described more land than the law authorized:

Smelting Co. vs. Kemp, 104 U. S., 636.

Where a patent was issued for lands included in a Mexican land grant, but for an excessive amount of lands prohibited by law.

Maxwell Land Grant Case, 121 U. S., 325.

In these and numerous other cases that might be cited, the courts declared the patents conclusive and unassailable collaterally; and that it must be conclusively presumed that the patentee was entitled to pre-empt the land and that such land was of a kind and character subject to such entry, and all proper and necessary prerequisites complied with. In all such cases the courts hold that while the government may bring action to cancel the entry and set aside the patent, yet as to other claimants the patentee's title is perfect.

So far as our examination has gone, the validity of a patant issued upon agricultural lands included within the limit of an incorporated city, has not been finally determined by this court.

It has, however, been passed upon in some of the Circuit Courts.

In *Root vs. Shields, 1 Woolworths C. C. Rep. 340,*

and as to lands withdrawn from entry by Mexican grant in

Doolan vs. Carr, 125 U. S. 618.

In this case the court holds extrinsic evidence may be introduced to prove want of power in an officer of the Land Office to issue a land patent, and therefore the patent is void.

We, however, call the attention of the court to the dissenting opinion of Chief Justice Waite.

Id. P. 633,

citing and considering many authorities sustaining the doctrine that such patent can be attacked only by those showing a superior title. And this doctrine seems to us to be based on sound reason.

In nearly all the former cases, the dispute arises between adverse claimants to a title.

In the case at bar plaintiff holds a patent, regular in form. The government at time of issuance of patent had a perfect title to the land in controversy. It issued its patent, and every intendment and presumption is in favor of its validity. Unless set aside by the government itself, or attacked by one holding a superior title, it should be held a good conveyance While defendant's answer avers its title to the premises, no title was shown, nor can any be.

Any other rule allows a great injustice to be done under forms of law. The government allowed plaintiff to survey the lands at his own expense, received his money, and issued a patent to lands it owned.

If defendant is not obliged to show any title, any speculator or squatter may watch an opportunity when the patentee is off the land, and by squatting upon the premises, defeat plaintiff 's patent title.

But whether or not such be the general rule, it certainly is true that if any provision of the United States' statutes authorize the entry of such lands, then it must be *presumed* the requirements of the law were complied with, and the decision of the department is upon matters within its power and conclusive.

Sections 2,380-2,384 provide for the establishment and plattting of town sites, for the sale of urban tracts, and section 2,383:

"But any actual settler upon any one lot, as above provided, and "upon any additional lot in which he may have substantial improve-

"ments, shall be entitled to prove up and purchase the same *as a pre-*
"*emption*, at such minimum, at any time before the day fixed for
"public sale."

Section 2,385. In case platted lots do not conform to the statutory size, the price may be increased to such an amount as the secretary of the interior may by rule prescribe.

Such town sites were limited in amounts to 640 acres.

By Chap. 113, page 138 Supplement of Revised Statutes of U. S., the above statutes were amended. The amendment is by its terms retroactive.

It provides that the existence or incorporation of any town on public lands shall not be held to exclude from pre-emption or homestead entry a greater quantity than 2,560 acres, etc., and that the excess are open to disposal under the homestead and pre-emption laws.

The commissioner of the general land office is given charge of the disposal of such lands, and upon default of the town authorities to make selection, he may himself set off the site and declare the remaining lands open to settlement under such homestead and pre-emption laws.

Under these provisions there is little doubt but that these lands in question might be subject to entry under the homestead and pre-emption laws, and their disposal entirely under the control of the land department.

The courts below therefore erred in declaring plaintiffs patent void on its face.

III.

As to the second objection as to the admission in evidence of the patent, viz:

That Vananker's original entry under Sec. 2304 of R. S. of United States was not made until after section 2306 was passed. It is admitted that Sec. 2304 original homestead act was passed, June 8th, 1872, and Section 2306, additional homestead act, was passed March 3, 1873. And that Vananker's original entry was not made until April 7, 1873. But without argument as to the absurdity of the proposition that the additional homestead act, Sec. 2306, was intended to cover only the cases of those soldiers or sailors who had made their original entries during the period from June 8, 1872, to March 3,

1873, only about eight months, it is sufficient to show that the land department, Secretary of the Interior, and the judiciary, all construed Sec. 2306 as taking effect on June 22, 1874, the date of the passage of the revised Statute of the United States, and any original patentee under Sec. 2304 whose original entry was made before the last named date, was entitled to the benefits of Sec. 2306.

In the "existing Land Laws of the United States," 1880. (A book issued under authority of act of Congress by a commission appointed for the purpose.) Sec. 235 and 237, there are large numbers of decisions cited to that effect.

As special instance:

Copps Public Land Laws, 1882, vol. 1, p. 475.
Com. Williamson to J. J. Thomas, Dec. 2, 1878.

"A soldier is entitled to make entry of 160 acres of either minimum or double minimum land under Sec. 2304 United States, but having once made an entry *subsequent* to June 22, 1874, his rights under the homestead laws are exhausted, notwithstanding he may have entered less than 160 acres. Under Sec. 2306, which applies only to original entries made prior to June 22, 1874, he may make an additional entry if original entry has *less* than 160 acres."

In the case of August Block (same book, page 476) it was ruled by Commissioner Burdett, July 17, 1875:

"The expression 'heretofore entered' in section 2,306 of the R. S. of the United States (re-enactment of the soldier's homestead law of June 8, 1872) is held to refer to the date of passage of the R. S. of United States, to-wit: June 22, 1874, instead of June 8, 1872." affirmed by Secretary Chandler April 4, 1876.

As the other assignments of error present the same questions, we make no argument on them. The whole case rests, in our judgment, on the admissibility of the patent.

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CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

NO. 277.

WILLIAM BURFENNING, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

BRIEF OF DEFENDANT IN ERROR.

THOMAS WILSON,
ATTORNEY FOR DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This is an action of ejectment brought by plaintiff in error, who alleges that he is the owner and entitled to the immediate possession of the premises in dispute—four so-called "islands" in the Mississippi River in the City of Minneapolis. This allegation is denied by the defendant. A jury was waived and the case tried by the Court. The Court found and decided "that the plaintiff is not the owner nor entitled to the possession of the real estate in the said complaint described, or to any part thereof," and directed judgment accordingly. (Record, p. 5.)

On the 19th of March, 1890, the plaintiff made a motion for a new trial (16), which was denied (17). Plaintiff thereupon appealed to the Supreme Court of Minnesota from the order denying that motion (17), and the latter Court affirmed the order and remanded the case to the Court below "for such other or further record and proceeding therein as may be by law necessary, just and proper under and by virtue of the said order" (18). On the 28th of April, 1892, judgment was entered by the lower

Court "on its findings and order for judgment." aforesaid (20, 21).

On the 13th day of May, 1892, the plaintiff appealed to the Supreme Court of Minnesota from that judgment (21 to 23), and it was thereupon ordered by that Court "*by consent of counsel*," that the judgment of the Court below * * * should be affirmed, and *pursuant to said order* it was affirmed. (24, 25.)

The case comes into this Court *to review that judgment so entered by consent.* (29, 30.)

The opinion of the Supreme Court of Minnesota printed in the Abstract of Record is that delivered on the appeal from the order of the lower Court denying plaintiff's motion for a new trial. By the laws of Minnesota a litigant has the right to appeal from an order denying a new trial, and being unsuccessful in that, to appeal from the judgment thereafter entered in the same case. (Statutes of Minnesota for 1894, Section 6140.) Of course the questions reviewed or reviewable on the appeal from the order are not necessarily or always the same reviewed or reviewable on the appeal from the judgment, but of course no question decided on the appeal from the order can be reviewed on the appeal from the judgment.

ARGUMENT.

I.

The so-called "case," Record page 5 to 16 inclusive, is not the equivalent of a bill of exceptions, and therefore presents no question for the consideration of this Court.

II.

The judgment which it is sought by this writ of error to review was rendered by consent (24). As admitted by plaintiff's counsel the decision or judgment of the Supreme Court of Minnesota on the appeal from the *judgment* of the lower Court was merely *pro forma*. It is therefore not reviewable by this Court. It is familiar doctrine that questions not raised or rulings not excepted to below cannot be raised or reviewed in this Court. And the decision or judgment of that Court on the appeal from the *order* of the lower Court was not a final judgment and is therefore not reviewable by this Court.

Union Mutual Life Ins. Co. vs. Kirchoff, 160 U. S. 374.

III.

Even if this "case" could be considered the equivalent of a bill of exceptions, it on its face shows that it is imperfect. Notwithstanding the certificate of the Judge (16) it is apparent that it does not contain all the evidence—that what may have been a most important and controlling item of evidence is not incorporated. As the record shows, an exemplified copy of the plat of these "islands" "*surveyed by S. H. Baker, deputy surveyor under special instructions dated October 21, 1892.* * * * was offered in evidence and received without objection for the purpose of identifying the premises in question: *and it was agreed that the lands in issue in this action were the same lands mentioned and described in this plat.* * * * *Said plat showed the location of the premises in dispute in the Mississippi River near the mouth of Bassett's Creek.*" (6.)

If this plat showed, as the Court will presume it may have shown, these "islands" to be merely alluvial or sand deposits close to the bank, not near or in the navigable waters of the river, then for that reason alone every ruling of the Court complained of was correct, for such "islands" belong to the riparian owners.

Grand Rapids R. Co., vs. Buttler, 159 U. S. 87;
Mitchell vs. Smale, 140 U. S.. 406;
Hardin vs. Jordan, 140 U. S.. 371.

It is to be borne in mind that these "islands" are in the Mississippi River, in the City of Minneapolis—a city of over 150,000 people;—that their survey "under special instructions" was made about thirty years after the United States surveys pursuant to which the public lands were sold,—that when the country is opened and the sod broken and the land cultivated or used as the site of a town or city, *alluvial or sand deposits are always made* at or near the mouth of influent creeks as in this case, and as said by this Court in the case first above cited, it would be "a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes (or rivers) after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possesion under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is

a cause of vexatious litigation, which ought not to be created or sanctioned." (159 U. S., 94.)

The plaintiff in this case must recover, if at all, on the strength of his own title, and there is nothing in the Record or case to justify the suggestion that this respondent "is a stranger to the title" or "a mere intruder."

It is the settled law of Minnesota that the owner of lands or lots abutting on the Mississippi, or any navigable river, has "the right to enjoy free communication between his abutting premises and the navigable channel of the river; to build and maintain for his own and the public use suitable landing places, wharves and piers on and in front of his lands and to extend the same therefrom into the river to the point of navigability, even though beyond low water mark, and to this extent exclusively to occupy for such and like purposes the bed of the stream subordinate and subject only to the navigable rights of the public and such needful rules and regulations for their benefit as need be prescribed by competent legislative authority. * * * These riparian rights are property and cannot lawfully be taken for public use without compensation."

Carli vs. Stillwater St. Ry. Co., 38 U. S., 380;
Schurmeier vs. The R. R. Co., 10 Minn., 82;
Ib., 7 Wallace. 272 *et seq.*

This case cannot be distinguished from the case last cited.

And even if this were not so, such "islands" would belong to the State, and not to the United States, and therefore the alleged patent under which plaintiff claims was absolutely void.

Gould on Waters, Sec. 77. 166;
Pollard vs. Hagan, 3 Howard. 312;
Martin vs. Waddle, 16 Peters. 367;
Barney vs. Keokuk, 94 U. S.. 324.

IV.

These lands, being within the corporate limits of the city, were, *for that reason*, reserved from pre-emption or homestead entry; and the Secretary of the Interior *had no jurisdiction* to issue a patent therefore under the homestead or pre-emption law.

Root vs. Shields, 1 Woolworth. 340-6;
Burfenning vs. Railway Co., 46 Minn.. 20.
Holton vs. Ry. Co., 86 Wis.. 59;
Morton vs. Nebraska, 21 Wall.. 660 *et seq;*
Revised Statutes U. S., Secs. 2257. 2258, 2289.

If necessary, this Court would take judicial notice of the territorial limits of a city.

Grusenmeyer vs. Logansport, 76 Ind., 549;
Covington vs. Sheppard, 20 Howard, 227, 232.

But it is not necessary to invoke this doctrine, for plaintiff in his complaint admits that these "islands" lie within the city limits. (3.).

It may be also observed that it is provided in the act amending the act incorporating the city, as follows: "This city charter shall be a public act, and need not be pleaded nor proven in any case." (Special Laws of Minnesota, 1881, Chap. 11, Sec. 16, page 493. ✗

THOMAS WILSON,
Attorney for Defendant in Error.

✗ The so-called bill of exceptions or case set out in this record presents no question that can be re-examined by this court on writ of error.